Malayan Banking Bhd v Tan Soek Phee & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCVC)(W)-2194–10 OF 2018 AND W-02(NCvC)(W)-2220–10 OF 2018
ABDUL KARIM, ABU BAKAR JAIS AND LIM CHONG FONG JJCA
4 AUGUST 2023

Contract — Damages — Loss of opportunity/chance — Whether High Court erred in refusing bank damages for loss of chance/opportunity — Whether Court wrongly held bank had not proven that it had suffered actual loss and that it had no prospect of success in recovering any monies from wound up borrower — Whether borrower's insolvency or winding up was irrelevant — Whether evidence showed solicitor's negligence had caused bank to lose opportunity of recovering its loan from borrower and guarantors — Whether bank was entitled to judgment for sum claimed as it was reasonable measure of damages and was not remote

The appellant ('MBB') had engaged the respondents — who were partners of a law firm — to take legal action against MBB's borrower and the borrower's two guarantors for failing to repay a loan. The actions that the respondents took ended in total failures. The suit that was filed against the borrower was struck out for want of prosecution and the respondents failed to reinstate the suit within the limitation period. A separate suit that was filed against the guarantors was dismissed after a full trial and although an appeal was filed against the decision, it was struck out because the appeal record was not filed within the prescribed timeframe. MBB sued the respondents for professional negligence and claimed for, inter alia, the refund of all legal fees it had paid the respondents, amounting to RM127,994, and also for damages for the loss of a chance/opportunity. The High Court found the respondents liable for negligence and ordered them to refund the RM127,994 to MBB. However, no damages were granted for loss of a chance/opportunity because the court held that MBB had not proven that it had suffered actual loss. The court held that MBB could rely upon a 'principal debtor' clause in the guarantee document to file a fresh suit against the guarantors in their capacity as principal debtors for the loan amount that was owed by the borrower. The High Court also took the view that MBB could recover nominal damages from the borrower, which had by then been wound up. The instant appeals were against the High Court's decision.

Held, unanimously allowing MBB's appeal and dismissing the respondents' appeal:

(1) On the facts, the High Court judge did not misdirect himself in finding that the respondents were professionally negligent. The omissions committed by the respondents were plainly inexcusable advocate's carelessness which resulted in the appellant losing the opportunity to claim what was not a negligible sum against the borrower and the guarantors. The High Court judge also properly found that the respondents must repay the legal fees that MBB had paid them (see paras 20 & 26).

(2) The 'principal debtor' clause in the letter of guarantee was meant only to preserve the liability of the guarantors in limited circumstances where they would otherwise be discharged from the guarantee such as where the creditors improperly released a security or gave extra time to the debtor to repay the debt. MBB could not rely on the principal debtor clause to re-pursue action against the guarantors as limitation under the Limitation Act 1953 had set in. The High Court judge erred in holding that because of the principal debtor clause MBB had not lost the opportunity to claim its loss against the borrower because a similar action could be re-instituted against the guarantors. Appellate intervention was necessary to correct this mistaken premise of the law adopted by the High Court judge (see para 22).

(3) Damages for loss of opportunity/chance was an established head of claim. The evidence adduced showed that the borrower, and in consequence, the guarantors, (collectively 'the defendants') were indebted to MBB in excess of RM3m for the loan disbursed. However, MBB confined its discounted claim to only RM750,000 which was the sum offered to the respondents in full and final settlement of MBB's claim. In the premises, there was an actual loss of RM750,000 reasonably suffered by MBB that was recoverable from the respondents. The High Court judge erred in holding that MBB had suffered no actual loss and that there was no prospect of success if it sought to recover any monies from the borrower because the latter had been wound up (see paras 27–28).

(4) There was no necessity for MBB to show that it would be able to successfully recover damages from the borrower in actuality. In other words, it was immaterial if the borrower was insolvent or even wound up. It sufficed so long as the damages suffered by MBB were recoverable as a reasonable measure of damages and was not too remote. As MBB had claimed a total of RM750,000 and the High Court had already awarded it RM127,994, MBB was entitled to the further sum of the difference amounting to RM622,006 for which sum judgment was hereby granted. The High Court's judgment was varied to order the respondents to pay MBB this additional sum of RM622,006 as damages for its loss of chance (see paras 3 & 29–30).

[Bahasa Malaysia summary

Perayu ('MBB') telah melantik responden — yang merupakan rakan kongsi firma guaman — untuk mengambil tindakan undang-undang terhadap peminjam MBB dan dua penjamin peminjam kerana gagal membayar balik pinjaman. Tindakan yang diambil oleh responden berakhir dengan kegagalan teruk. Saman yang difailkan terhadap peminjam telah dibatalkan kerana kelengahan perbicaraan dan responden gagal menghidupkan semula saman tersebut dalam tempoh had masa. Saman berasingan yang difailkan terhadap penjamin telah ditolak selepas perbicaraan penuh dan walaupun rayuan telah difailkan terhadap keputusan tersebut, ia telah dibatalkan kerana rekod rayuan tidak difailkan dalam tempoh masa yang ditetapkan. MBB menyaman responden atas kecuaian profesional dan menuntut, antara lain, pengembalian semua fi guaman yang telah dibayarnya kepada responden, berjumlah RM127,994, dan juga untuk ganti rugi atas kehilangan nasib/peluang. Mahkamah Tinggi mendapati responden bertanggungjawab atas kecuaian dan memerintahkan mereka membayar balik RM127,994 kepada MBB. Walau bagaimanapun, tiada ganti rugi diberikan untuk kehilangan nasib/peluang kerana Mahkamah berpendapat bahawa MBB tidak membuktikan bahawa ia telah mengalami kerugian sebenar. Mahkamah memutuskan bahawa MBB boleh bergantung pada klausa 'penghutang prinsipa' dalam dokumen jaminan untuk memfailkan saman baharu terhadap penjamin atas kapasiti mereka sebagai penghutang prinsipal bagi jumlah pinjaman yang dihutang oleh peminjam. Mahkamah Tinggi juga berpandangan bahawa MBB boleh mendapatkan ganti rugi nominal daripada peminjam, yang pada masa tersebut telah digulung. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara membenarkan rayuan MBB dan menolak rayuan responden:

(1) Pada fakta, hakim Mahkamah Tinggi tidak salah arah dalam mendapati bahawa responden cuai secara profesional. Peninggalan yang dilakukan oleh responden adalah kecuaian peguamcara yang tidak boleh dimaafkan yang mengakibatkan perayu kehilangan peluang untuk menuntut jumlah yang tidak boleh diabaikan terhadap peminjam dan penjamin. Hakim Mahkamah Tinggi juga mendapati bahawa responden mesti membayar balik fi guaman yang telah dibayar oleh MBB kepada mereka (lihat perenggan 20 & 26).

(2) Klausa 'penghutang prinsipal' dalam surat jaminan dimaksudkan hanya untuk memelihara liabiliti penjamin dalam keadaan terhad di mana mereka sebaliknya akan dilepaskan daripada jaminan seperti di mana pemiutang melepaskan sekuriti secara tidak wajar atau memberi masa tambahan untuk penghutang untuk membayar balik hutangnya. MBB tidak boleh bergantung pada klausa penghutang prinsipal untuk meneruskan semula tindakan terhadap penjamin sebagaimana had di

bawah Akta Had Masa 1953 yang telah berjalan. Hakim Mahkamah Tinggi terkhilaf kerana berpendapat bahawa kerana klausa penghutang prinsipal MBB tidak kehilangan peluang untuk menuntut kerugiannya terhadap peminjam kerana tindakan yang sama boleh dimulakan semula terhadap penjamin. Campur tangan rayuan adalah perlu untuk membetulkan premis undang-undang yang salah ini yang diguna pakai oleh hakim Mahkamah Tinggi (lihat perenggan 22).

(3) Kerugian kerana kehilangan nasib/peluang adalah tuntutan utama yang telah ditetapkan. Keterangan yang dikemukakan menunjukkan bahawa peminjam, dan akibatnya, penjamin, (secara kolektif 'defendan') berhutang kepada MBB melebihi RM3 juta untuk pinjaman yang dikeluarkan. Bagaimanapun, MBB mengehadkan tuntutan diskaunnya kepada hanya RM750,000 iaitu jumlah yang ditawarkan kepada responden dalam penyelesaian penuh dan muktamad tuntutan MBB. Di dalam premis tersebut, terdapat kerugian sebenar RM750,000 yang munasabah dialami oleh MBB yang boleh diperolehi semula daripada responden. Hakim Mahkamah Tinggi terkhilaf apabila berpendapat bahawa MBB tidak mengalami kerugian sebenar dan tidak ada prospek kejayaan jika ia berusaha mendapatkan semula sebarang wang daripada peminjam kerana yang ianya telah digulung (lihat perenggan 27–28).

(4) Tidak ada keperluan untuk MBB menunjukkan bahawa ia akan berjaya mendapatkan semula ganti rugi daripada peminjam pada hakikatnya. Dalam erti kata lain, ia adalah tidak penting jika peminjam tersebut insolven atau digulung. Ia memadai selagi kerugian yang dialami oleh MBB boleh dipulihkan sebagai ukuran ganti rugi yang munasabah dan tidak terlalu kecil. Memandangkan MBB telah menuntut sejumlah RM750,000 dan Mahkamah Tinggi telah pun menganugerahkannya RM127,994, MBB berhak mendapat jumlah selanjutnya perbezaan berjumlah RM622,006 yang mana jumlah penghakiman telah diberikan. Penghakiman Mahkamah Tinggi diubah untuk memerintahkan responden membayar MBB jumlah tambahan sebanyak RM622,006 ini sebagai ganti rugi atas kehilangan peluangnya (lihat perenggan 3 & 29–30).]

Cases referred to

Credit Corporation (M) Berhad v Choi Sang & Another [1999] 1 CLJ Rep 440, HC (distd)

Miranda v Khoo Yew Boon [1968] 1 MLJ 161, FC (refd)

Nor Azlina bt Abdul Aziz v Expert Project Management Sdn Bhd [2017] 3 MLJ 763; [2017] 5 CLJ 58, CA (folld)

Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor [2020] 4 MLJ 380, CA (refd)

Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd [2015] 1 MLJ 490, CA (not folld)

A *Public Bank Bhd v Datuk Mohd Ali bin Hj Abdul Majid & Anor* [2013] 2 MLJ 709, HC (folld)
Shearn Delamore & Co v Sadacharamani a/l Govindasamy [2017] 1 MLJ 486, CA (distd)
Suresh Subramaniam v Majlis Perbandaran Selayang [2023] MLJU 2051; [2023] MLRAU 108, CA (folld)
B *Techrew Sdn Bhd v Nurhamizah bt Hamzah (sued as sole proprietor of Chamber of Nur Hamizah Hamzah) & Ors* [2022] 4 MLJ 633, CA (folld)
Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor [2017] 4 MLJ 207; [2017] 6 CLJ 368, CA (refd)
C *Wong Kim v Loh Kim Foon* [2003] 4 MLJ 535, HC (refd)

Legislation referred to

Limitation Act 1963

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Appeal from: Civil Suit No WA-22NCVC-314–05 of 2016 (High Court, Kuala Lumpur)

Sean Yeow Huang Meang (with Andrea Chew Mei Yng) (Lee Hishamuddin Allen & Gledhill) for the plaintiff.
E *Tan Keng Teck (with Clarence Hng Ying Chui) (Lim Kian Leong & Co) for the defendants.*

Lim Chong Fong JCA:

F INTRODUCTION

[1] These are appeals against the trial judgment of the High Court that partially allowed the claim pertaining to solicitor's professional negligence.

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[2] The learned High Court judge on 25 September 2018 adjudged and ordered as follows:

(a) the defendants are to make payment of the sum of RM127,994 to the plaintiff together with interest on the said amount at 5%pa from 30 May
H 2016 until full settlement;

(b) the plaintiff's claim for damages for loss of chance is dismissed; and

(c) no order as to costs.

I **[3]** We have on 10 April 2023 unanimously allowed the Appeal No W-02(NCVC)(W)-2194–10 of 2018 ('Appeal 2194'). In this regard, we varied the High Court judgment dated 25 September 2018 by allowing and ordering the defendants to make payment of the plaintiff's claim for damages for loss of a chance and hence judgment was accordingly entered in the sum of

RM622,006 to the plaintiff. However, we dismissed Appeal No W-02(NCVC)(W)–2220 ('Appeal 2220'). There shall be no order as to costs as agreed by the parties.

[4] We now provide the grounds of judgment below and continue to address the parties as plaintiff and defendants for convenience.

BACKGROUND

[5] The plaintiff gave banking loan facilities to a CSPM Technology Sdn Bhd ('borrower') which have been personally guaranteed by Chin Kwong Wah and Ng Lee Eng ('guarantors').

[6] By reason of the default of the borrower and guarantors in re-paying the loan disbursed by the plaintiff together with interest accrued, the appellant instructed the firm Messrs Abd Aziz Chen, Advocates and Solicitors to recover the losses sustained by the appellant from the borrower and guarantors. At all material times, the defendants are the partners of Messrs Abd Aziz Chen.

[7] Consequently, Messrs Abd Aziz Chen on behalf of the plaintiff initiated legal proceedings against the borrower via Kuala Lumpur High Court Suit No D3-22–43 of 2008 ('Suit 43') and the guarantors via Penang High Court Suit No 22–121 of 2002 ('Suit 121'). By reason that Suit 121 was not served upon the guarantors before the expiration of the writ, Messrs Abd Aziz Chen thereafter re-initiated Penang High Court Suit No 22–162 of 2004 ('Suit 162') against the guarantors.

[8] In respect of Suit 162, the suit was dismissed after a full trial. Messrs Abd Aziz Chen appealed to this court via Civil Appeal No W-02–2684–10 of 2011 on behalf of the plaintiff but the appeal was struck off because of Messrs Abdul Aziz Chen's failure to file the appeal record within the prescribed time. As for Suit 43, the suit was struck off for want of prosecution and Messrs Abd Aziz Chen failed to re-instate the suit within the limitation period.

[9] The borrower was wound up on 5 November 2015.

[10] As a result, the plaintiff initiated KL High Court Suit No WA-22NCVC-314–05 of 2016 ('Suit') against the defendants premised on professional negligence and claimed the following:

(a) refund of all legal fees amounting to RM127,994;

(b) damages for the loss of a chance/opportunity;

(c) interest;

(d) costs on a solicitor and client basis; and

(e) such further and other relief as this honourable court deems fit.

IN THE HIGH COURT

[11] After trial of the suit, the learned High Court judge found the defendants professionally negligent for failure to timeously file the appeal record on the appeal against the trial decision of Suit 43 as well as for failure to prosecute Suit 162 and re-instate the suit within the prescribed limitation period notwithstanding the plaintiff did not adduce expert evidence on the standard of care of solicitors.

[12] Consequently, the learned High Court judge found that the defendants must refund the legal fees of RM127,994 received following this court's decision in *Public Bank Bhd v Datuk Mohd Ali bin Hj Abdul Majid & Anor* [2013] 2 MLJ 709.

[13] However, the learned High Court judge did not find the defendants liable for damages that arose from the loss of a chance/opportunity because the plaintiff did not prove its loss in that the plaintiff was at the material time still able to re-institute a new suit against the guarantors as principal debtor of the borrower when Suit 43 was struck out for want of prosecution. More pertinently, the learned High Court judge did not award damages for loss of a chance/opportunity because the plaintiff could at best recover only nominal damages from the borrower which has been wound up. In other words, there was no actual loss sustained by the plaintiff. Reliance was made on the case of this court in *Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd* [2015] 1 MLJ 490 wherein Hamid Sultan Abu Backer JCA held as follows with emphasis added:

> [9] In addition, it must be noted when a matter is struck out there will be at least two types of damages for client. One is actual damage for costs to reinstate or refilling inclusive of instructing new solicitors to take conduct of the matter as the case may be and the other the 'loss of chance to sue'. To say 'actual damage' will not arise upon the case being struck out is a fact quite difficult to comprehend. *However, on the second part of 'loss of chance' there will not be any liability if there is no actual loss and/or reasonable prospect of success* as advocated in the submission of the appellant.

[14] The plaintiff was dissatisfied with the findings of the learned High Court judge and thus filed Appeal 2194 on 23 October 2018. The defendants were likewise dissatisfied with the findings of the learned High Court judge and thus also filed Appeal 2220 on 24 October 2018.

FINDINGS OF THIS COURT

[15] Before us in both their written submissions and oral arguments, the parties repeated their contentions made in the High Court.

[16] We are accordingly guided by the decision of this court in *Nor Azlina bt Abdul Aziz v Expert Project Management Sdn Bhd* [2017] 3 MLJ 763; [2017] 5 CLJ 58 where Harmindar Singh JCA (now FCJ) held as follows:

> [20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:
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> (a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forests & Anor v Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal* [2010] 3 MLJ 509; [2010] 3 CLJ 377);
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> (b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1; [2009] 6 CLJ 626);
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> (c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309);
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> (d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87; [2008] 2 CLJ 284);
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> (e) where the trial judge was plainly wrong in arriving at his decision (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19);
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> (f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see *First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd* [2013] 4 MLJ 693; [2013] 1 LNS 625 which followed the Privy Council case of *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165b; [1984] 1 LNS 40); and
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> (g) where the judgment is based upon a wrong premise of fact or of law (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416).

Liability

[17] Hence in respect of the finding of liability raised by the defendants, we refer and rely on the recent case of this court of *Suresh Subramaniam v Majlis Perbandaran Selayang* [2023] MLJU 2051; [2023] MLRAU 108 which adopted the earlier findings in *Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon) v Advance Specialist Treatment Engineering Sdn Bhd* where Hamid Sultan Abu Backer JCA held as follows with emphasis added:

> [7] *There are authorities to suggest that in a case of this nature the respondent still has to prove his case against the third party on the balance of probabilities*. This was not done in this case. In *Sharif & Ors v Garrett & Company* [2002] 1 WLR 3118, the court with similar issues had relied on *Lord Justice Simon Brown in Mount v Barker Austin* [1998] PNLR 493 at pp 510/511, where His Lordship had summarised the relevant consideration as follows:
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> (i) *The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim, he has lost something of value ie, that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success*;
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> (ii) The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant;
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> (iii) *If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors*. It is quite likely that the delay would have caused such difficulty and quite possible, indeed, that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case;
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> (iv) *If and when the court decides that the plaintiff's chances in the original action were more than merely negligible, it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure*;
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> These principles are largely taken from the leading cases of *Kitchen v Royal Air Force Association* [1958] 1 WLR 563 and *Allied Maples Group Ltd v Simmons and*

Simmons [1995] 1 WLR 1602 and have been applied in a number of cases to which we were referred ...

[18] We observed the defendants relied on the cases of this court in *Shearn Delamore & Co v Sadacharamani a/l Govindasamy* [2017] 1 MLJ 486 as well as *Tetuan Theselim Mohd Sahal & Co & Ors v Tan Boon Huat & Anor* [2017] 4 MLJ 207; [2017] 6 CLJ 368 that it was fatal to the plaintiff *in limine* by its failure to call a practising solicitor to testify as expert witness at the trial to establish the requisite standard of care of a solicitor in ascertaining the prospect of success of the original case. The learned High Court judge however held against the defendants.

[19] We acknowledged that the plaintiff must establish it has lost the opportunity to pursue a claim that has a good prospect of success. We are however of the view that the *Shearn Delamore & Co and Tetuan Theselim Mohd Sahal & Co & Ors* cases are distinguishable in that the alleged breach there pertained to non-contentious intellectual property and conveyancing solicitor's practice respectively. As to contentious advocate's litigation practice, we find there is no necessity for expert evidence of a practising advocate to apprise the court because the court is equally well place to independently appraise and evaluate the requisite standard of care of an advocate: see *Wong Kim v Loh Kim Foon* [2003] 4 MLJ 535. Thus, Suraya Othman JCA held as follows in *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380 with emphasis added:

> [64] On the need to call expert evidence, we are of the view that in our instant case the fact that no expert was called to give evidence on the standard of care, is not fatal. The case of *Shearn Delamore* and *Tetuan Theselim Mohd Sahal* has to be distinguished. *Shearn Delamore* it is a case on intellectual property and the case of *Tetuan Theselim Mohd Sahal* involves a SPA. Both these cases on intellectual property and conveyancing require an expert to be called to establish the standard of care required or expected from competent practitioners practicing in those specialised fields to establish whether the standard of care has been breached. *In our instant case, it is a simple case. It pertains to the duty of a practitioner to inform and advise the client of the consequence of non-payment of SFC which would result in the case being struck off. It involves the duty of the practitioner to be diligent, to ask for an extension of time if time has expired and foremost to inform the client on the prospect of success of the client's case and not lead the client on and when the case got struck off to turn the table against the client by alleging that the case has no prospect or chances of winning after all.*

[20] On the facts here, we are satisfied that the learned High Court judge has not misdirected himself when he found the defendants professionally negligent for failure to timeously file the appeal record on the appeal against the trial decision of Suit 43 as well as for failure to prosecute Suit 162 and re-instate the suit within the prescribed limitation period; see *Miranda v Khoo Yew*

Boon [1968] 1 MLJ 161 and *Jackson & Powell on Professional Negligence* (5th Ed) at p 641. It is our view that the omissions committed by Messrs Abd Aziz Chen are plainly inexcusable advocate's carelessness which resulted in the plaintiff having lost the opportunity to claim which is not negligible against the borrower and guarantors.

[21] That notwithstanding, we are aware that the defendants relied on the learned High Court judge's adverse finding against the plaintiff in that the plaintiff could have then still re-litigate against the guarantors as the result of the striking out of Suit 43 for want of prosecution without being fettered by limitation by virtue of the principal debtor clause found in the guarantee which provides:

> 17. As a separate and independent stipulation, I/We agree that any sum or sums of money which may not be recoverable from me/us on the footing of a guarantee whether by reason of any legal limitation, disability or incapacity on or of the Customer or by any fact or circumstances and whether known to you or not shall nevertheless be recoverable from me/us or each of us as sole or principal debtors and shall be paid by me/us on demand.

Reliance was made by the defendants on the case of *Credit Corporation (M) Berhad v Choi Sang & Another* [1999] 1 CLJ Rep 440.

[22] With respect, we find that this principal debtor clause is meant only to preserve the guarantor's liability in limited circumstances where he would otherwise be discharged from the guarantee such as where the creditors improperly releases a security or gives extra time to the debtor to repay the debt; see *O'Donovan and Philips on The Modern Contract of Guarantee* (English Ed) at para 1-101. Consequently, we hold that the plaintiff would on the facts here be unable to re-pursue against the guarantors in reliance on this principal debtor clause when court action against them is barred by limitation under the Limitation Act 1963. The case of *Credit Corporation (M) Berhad* is in our view distinguishable on dissimilar facts which did not concern limitation. Hence in our view, the learned High Court judge erred in concluding that the plaintiff did not lose any opportunity to claim its loss against the borrower because a similar action can be re-instituted against the guarantors. Appellate intervention here is justified on the mistaken premise of law adopted by the learned High Court judge.

[23] We are also satisfied that the plaintiff has a good prospect of success against the borrower and guarantors in both Suit 43 and Suit 162 because they are straightforward loan recovery cases.

[24] In the premises, we find there is merit in Appeal 2194 that justified appellate intervention but not in Appeal 2220.

Damages

[25] As the result of the learned High Court judge's finding on liability, we are mindful that the learned High Court judge only allowed the plaintiff's claim for recovery of legal fees paid to the defendants amounting to RM127,994 but dismissed the plaintiff's claim for loss of chance because the plaintiff failed to prove its actual loss as well as there was no reasonable chance of the borrower re-paying any part of the loan sum whatsoever because the borrower had been wound up due to its financial impecuniosity.

[26] We firstly find that the learned High Court judge has properly found and held that the defendants must re-pay the plaintiff for the legal fees paid following this court's decision in *Public Bank Berhad v Datuk Mohd Ali bin Haji Abdul Majid*.

[27] Next, it is trite that damages for loss of opportunity/chance is an established head of claim following this court's decision in *Techrew Sdn Bhd v Nurhamizah bt Hamzah (sued as sole proprietor of Chamber of Nur Hamizah Hamzah) & Ors* [2022] 4 MLJ 633. We are satisfied from the evidence adduced that the borrower and in consequence the guarantors too are indebted to the plaintiff in excess of RM3m for the loan disbursed. However, the plaintiff has confined its discounted claim here to only RM750,000 offered to the defendants in full and final settlement of the suit. In the premises, we find and hold that there is hence actual loss of RM750,000 reasonably suffered by the plaintiff that is recoverable from the defendants. The learned High Court judge has erred that there was no actual loss suffered by the plaintiff and appellate intervention is thus warranted here as well.

[28] Moreover, we observed that the learned High Court judge went on to find and hold that the borrower was already insolvent when the Suit 43 was still ongoing, hence there is no prospect of success of recovery relying on the case of *Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon)*; see para [12] above.

[29] With respect, we find and hold there is no necessity that the plaintiff must be able to successfully recover the damages from the borrower in actuality. In other words, it is immaterial if the borrower was financially insolvent or even wound up. We are of the view that it suffices so long the damages suffered by the plaintiff are recoverable as a reasonable measure of damage and not too remote. Thus for completeness, we are, with respect, constrained to hold that para [9] of *Pang Yeow Chow (practising at Messrs YC Pang, Chong & Gordon)* is per incuriam.

[30] As to the quantum of damages, we noted that the plaintiff claimed a total of RM750,000. Since the learned High Court judge has already awarded the sum of RM127,994, we therefore find that the plaintiff is only entitled to the further sum of the difference amounting to RM622,006.

CONCLUSION

[31] It is for the foregoing reasons that we allowed Appeal 2194 and dismissed Appeal 2220 as so ordered.

Appeal allowed.

Reported by Ashok Kumar